IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 122

In Re Certain Grand Jury Proceedings,
ARMANDO PIEMONTE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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LIST OF AUTHORITIES

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Armando Piemonte, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit in the above entitled cause.

Opinion of the Court Below

The order of the United States District Court for the Northern District of Illinois, Eastern Division, sentencing petitioner for contempt of court, was entered on August 18, 1959. See Appendix, page 48.

The as yet unreported opinion of the United States Court of Appeals for the Seventh Circuit, affirming the order in the District Court, was filed on February 29, 1960. It appears in full in an Appendix hereto.

Jurisdiction

The judgment of the Court of Appeals sought to be reviewed was entered February 29, 1960. Petition for Rehearing was denied on May 3, 1960. This Petition for Certiorari is filed within thirty days of the denial of the Petition for Rehearing.

This Court's jurisdiction is invoked under Title 28, U. S. Code, Section 1254(1) and Rule 19(b) of the Rules of this Court.

QUESTIONS PRESENTED FOR REVIEW

I. Whether a prisoner in a federal penitentiary can properly be taken before a Grand Jury, granted "immunity" to testify as to narcotics transactions, held in contempt of court following his refusal to answer and given a substantial sentence, where the procedure by which he is processed is mechanical; where court and prosecutor openly differ as to his constitutional rights and as to what is required of him; where he is not represented by counsel at crucial stages in the proceedings, and where he is thereafter indicted by the same Grand Jury?

II. Whether a petitioner can be held in contempt of a void verbal order which he fails to obey, or a written order which is never served upon him or otherwise brought to his attention?

III. Whether petitioner may be held in contempt of court for failure to abide a written order purporting to confer immunity, which order was defective in form, and in substance in that as to its substance, it deprived petitioner of his constitutional right not to incriminate himself by failing to make the immunity granted co-extensive with his constitutional privilege?

IV. Whether petitioner could be held in contempt of court without the court's having made a determination that he properly invoked his privilege not to incriminate himself as to certain questions asked of him, and where he was not granted immunity as to those questions?

STATUTES INVOLVED

Petitioner was adjudged guilty of contempt of court under the provisions of Section 401(3), Title 18, U. S. Code, as affected by Section 1406, Title 18, U. S. Code, the pertinent provisions of which statutes are set out in full in the Appendix hereto.

CONCISE STATEMENT OF CASE

The District Court record appears substantially in its entirety in petitioner's Appendix. Petitioner's subsequent indictment for narcotic offenses became a part of the record in the Court of Appeals subsequent to the filing of the Appendix, has been certified by the Clerk of the Court of Appeals and is stapled to the copies of the Appendix filed in this Court.

The Proceedings Below

On August 10, 1959, Your Petitioner was called as a witness by a Grand Jury convened in the Northern District of Illinois (App. 4). He stated his name, admitted he was then imprisoned in Leavenworth Penitentiary for the sale and possession of heroin (App. 4-5). Petitioner declined to answer where he obtained that heroin, and whether he knew certain named persons, had obtained heroin from or sold heroin or marijuana to them, and the like (App. 4-10).

With the approval of the Attorney General, thereupon the prosecutor petitioned the District Court (App. 10-13) to compel petitioner's testimony on the ground that the Grand Jury was investigating the narcotic traffic, involving violations of: Parts 1 and 2 of Subchapter A, Chapter 39, Internal Revenue Code of 1954; of Section 174, Title 21, United States Code; and Section 184(a), Title 21, United States Code. The prosecutor's petition stated that the testimony of the petitioner was needed in the public interest. The District Court then found orally that Your Petitioner's privilege against possible self-incrimination was not properly asserted as to questions relating to narcotic offenses of which petitioner had already been found guilty, but would apply to the other questions put to him (App. 17-18). The District Judge then addressed Your Petitioner in the following terms:

> "The Court: . . . I find that you are a necessary and material witness to the Grand Jury investigation now being conducted by the . . . Grand Jury . . . And in accordance with the provisions of the Narcotic Control Act, this court now grants you immunity from prosecution which might arise from any answers that you give to this Grand Jury concerning the matter of their investigation.

"It, therefore, is no longer necessary for you to invoke the protection of the Fifth Amendment to protect yourself from incrimination or subsequent prosecution, because pursuant to the provisions of the Narcotic Control Act, I now grant you immunity from such prosecution and direct you to answer the questions propounded to you by the Grand Jury.

"Do you understand the order of the court?"

"Mr. Piemonte [petitioner]: Yes, sir, your Honor." (App. 18-19).

A written order was also entered (App. 14-15). That order stated that the United States Attorney, with the approval of the Attorney General, had applied to the District Court, said application reciting that the Grand Jury was investigating violations of Parts 1 and 2 of Subchapter A, Chapter 39, I. R. C. 1954, the penalty for which is provided in Subsections (a) and (b) of Section 7237, Title 26, U. S. Code, and violations of Section 174 and 184(a), Title 21, U. S. Code; that petitioner's testimony was needed; that the application was made in good faith; and that petitioner had appeared before the Grand Jury and claimed his privilege against self-incrimination instead of answering questions. The order contained a finding that petitioner had properly asserted his privilege. In its decretal portion the written order provided only that petitioner, if called before the Grand Jury relative to this inquiry, should not be excused from testifying on the ground of possible self-incrimination. The order further recited that it was made in accordance with Section 1406, Title 18, U. S. Code.

On being recalled by the Grand Jury, the prosecutor advised petitioner ". . . the Judge . . . granted you immunity and ordered you to answer questions propounded to you before this Grand Jury concerning narcotics" (App. 21).

Petitioner again declined to answer where he got the heroin (App. 22) and declined to answer a series of questions substantially the same as those asked in his previous appearance before the Grand Jury (App. 24-25).

Petitioner further declined, for reasons of possible self-incrimination, to answer a series of questions not previously put to him, relating to the identification of and appellant's narcotics dealings with, persons not referred to in his first appearance before the Grand Jury (App. 26).

On the government's motion (App. 28-29) the District Judge ordered petitioner to show cause why he should not be held in contempt of court for a refusal to answer the questions put to him (App. 32-33). Following a hearing before the court (App. 34-36) petitioner was adjudged guilty of contempt and sentenced to prison for eighteen months, the sentence to run consecutive to the sentence then being served by petitioner in the United States Penitentiary (App. 48).

REASONS FOR ALLOWANCE OF THE WRIT

I.

The proceedings in the District Court cannot sustain a contempt finding because in the course of those proceedings both prosecutor and District Judge failed to clarify the requirements placed upon petitioner to answer the Grand Jury's questions. Instead, both permitted the proceedings to move mechanically, without due regard for petitioner's right not to incriminate himself, and without due regard to his situation as a convicted man.

When he appeared before the grand jury, petitioner was a prisoner of the Federal government. He was, and is today, confined in Leavenworth Penitentiary in the course of serving out a six-year sentence. His conviction was for the possession and sale of narcotic drugs (App. 4).

In the course of his initial interrogation before the Grand Jury on August 10, 1959, Mr. Max Goldschein, Special Agent of the Department of Justice, questioned petitioner regarding the source of the heroin for whose possession and sale he had been convicted, and as to whether or not he had dealt in narcotic drugs or marijuana with a number of named persons (App. 6-10). Petitioner admitted his conviction but declined to answer further on grounds of possible self-incrimination. Agent Goldschein informed petitioner that he could not invoke his privilege as to things related to offenses of which he stood convicted (App. 5).

On August 13, 1959, Agent Goldschein moved the District Court to require the petitioner to answer his ques-

tions, under the authority of Section 1406, Title 18, United States Code (App. 10-13). A hearing ensued in the course of which the District Judge observed that the privilege against self-incrimination could not be invoked as to matters related to offenses for which petitioner had been convicted (App. 17). Agent Goldschein disagreed with the court (App. 16). The court asserted that the balance of the testimony sought would tend to incriminate petitioner (App. 17).

The court then told petitioner, that he, the Judge, granted petitioner immunity, and directed him ". . . to answer the questions propounded to you by the Grand Jury" (App. 19). Petitioner stated he understood the order.

As argued hereafter, at Point II, the trial judge had no authority to enter such order.

Thereafter, on the same day, the District Judge entered a written order finding petitioner properly invoked his privilege. The order, containing no ostensive grant of immunity, ordered petitioner to return to the Grand Jury and answer its questions (App. 14-16).

We argue, at Points II and III, that petitioner did not have notice of the written order and that the written order was, in any event, defective.

Petitioner was recalled before the Grand Jury on August 14, 1959 (App. 21). He was advised by agent Goldschein:

> ". . . . the Judge . . . granted you immunity and ordered you to answer questions propounded to you before this Grand Jury *concerning narcotics*". (App. 21, emphasis supplied).

Petitioner was then asked concerning the source of the heroin for whose sale and possession he had been sentenced.

(App. 22); about a sale to one Geraci of a quantity of marijuana (App. 22); a number of questions which he had previously been asked; and new questions relating to the identity and criminal activities of persons not previously named (App. 23-26).

Petitioner again declined to testify other than to admit that he was then under sentence for commission of previous narcotic offenses.

Apparently petitioner had "talked" to a lawyer prior to his first appearance, but that he lacked effective assistance of counsel until after the entry of the show cause order is apparent from the colloquy between Mr. Piragine, an attorney who subsequently appeared for him, and the District Judge. Mr. Piragine noted that previous to August 14, petitioner did not have the aid or assistance of counsel (App. 35). To which the court replied:

"The Court: That is right." (App. 35)

It thus appears that petitioner found himself without proper assistance in a situation, the various factors of which he was necessarily unable to evaluate, whether or not he thought he could evaluate them. The prosecutor, a man learned in the law, and the District Judge, likewise a man learned in the law, could not get together on the question as to whether or not answers to questions pertaining to petitioner's previous conviction might tend to incriminate him. Mr. Goldschein told petitioner at the time of his first appearance before the Grand Jury that such questions could not tend to incriminate (App. 5). Mr. Goldschein, at the time of applying for an order on petitioner to answer represented to the District Judge that

the petitioner had properly invoked his privilege as to those matters (App. 16). Petitioner could only have concluded that Mr. Goldschein was mistaken, either before the grand jury or the court as to his right to invoke his privilege, or, alternatively had doubt from day to day as to what the rights of a grand jury witness might be. The court, on the other hand, disagreed with Mr. Goldschein's view as expressed in court, advising petitioner that he could not properly invoke his privilege concerning matters related to the subject of his conviction (App. 17). Subsequently the court entered a written order to the effect that petitioner's privilege was properly invoked as to the questions propounded to him and that they would tend to incriminate him (App. 14).

Thus petitioner found himself in a situation where persons who purported to know something of the law of the matter not only could not agree with one another, but could not, from time to time, even manage to agree with themselves. We suggest that where the powers of government were themselves openly in doubt as to the legal effect of various states of fact or fancy, it placed an unfair burden upon petitioner to require him to choose a proper course of conduct.

Further, the District Judge told the petitioner that he granted him immunity from prosecution arising from apparently *any* answers given to the Grand Jury concerning the matter of their investigation (App. 18-19) only to be told by Mr. Goldschein that the Judge had granted him immunity and ordered him to ". . . answer questions . . . . *concerning narcotics*" (App. 21, emphasis supplied).

Assuming that petitioner had seen the written order (App. 14-15) he would have found that he need answer only ". . . relative to the aforementioned inquiry of said Grand Jury . . ." (App. 15), leaving to petitioner the burden of

determining what constituted the scope of the inquiry of the Grand Jury.

Mr. Goldschein having restricted petitioner's immunity to questions relating to narcotics, then propounded questions referring to narcotics, others plainly unrelated to narcotics, and still others which may or may not have had to do with narcotics. Section 176(a), Title 21, United States Code, for example, has to do with dealing in marijuana which is imported contrary to law. Clearly that lies outside the ambit of the written order, the verbal order, and Mr. Goldschein's admonition. Yet when Mr. Goldschein returned to the Grand Jury, he inquired about a sale of marijuana to one Geraci (App. 22). Had petitioner answered the question affirmatively, he would properly have been subject to prosecution for sale of marijuana. Nevertheless, petitioner was sentenced to serve an additional period of eighteen months in the penitentiary, the basis for his sentence having been in part, at least, his refusal to answer that question.

Petitioner was also asked as to his acquaintance with named individuals. While those individuals may have engaged in narcotics traffic, it does not appear that they were not also engaged, with petitioner, in the commission of other crimes. If so, the admonition that he had immunity only as to matters relating to narcotics could only have had the effect of instilling in petitioner the belief that as to other matters he lacked immunity.

For obvious reasons, an adjudication of contempt can be predicated only upon a foundation which is clear, incisive, and leaves no doubt as to what is required to be done. *National Labor Relations Board* v. *Deena Artware*, 6 Cir., 261 F. 2d 503, 509 (1958); *Traub* v. *United States*, D. C. Cir., 232 F. 2d 43, 48-49 (1956).

We ask this Court to contrast the procedure followed below to that described in *Corona* v. *United States*, 6 Cir., 250 F. 2d 578-579 (1958) where Mr. Goldschein was commended by the Circuit Court for having proceeded properly, commenting that the appellant there was provided with counsel at an appropriate time and was sufficiently apprised concerning what questions to answer in order to comply with the court's order.

Here, petitioner had no counsel at the crucial stage of the proceedings, namely, on August 13, when immunity was supposedly granted to him (App. 15-20). This Court will also observe that in both the verbal order (App. 18-19) and in the written order (App. 14-15) the court fails to specify what questions were to be answered. Rather the burden was thrown upon petitioner to make that determination.

Taken altogether, petitioner could only have been convinced that he was enmeshed in an extremely treacherous situation, that he proceeded at the hazard of being indicted, tried, and convicted of offenses as to which immunity had not been granted, and that he had best seek refuge in what he naively believed to be a viable constitutional provision.

In its opinion (Appendix A, *infra*) the Court of Appeals stressed the fact that at the contempt hearing petitioner's announced motive for his refusal to testify was his fear of underworld retaliation. We do not find fault with the Court of Appeals' observation that such fears provided no basis for that refusal. But that opinion overlooks the fact that whatever motive causes a man to invoke his constitutional privilege is irrelevant so long as he properly invokes it.

That petitioner properly invoked his constitutional privilege to refuse to incriminate himself is evidenced by the fact that the very same grand jury which questioned him, thereafter indicted him for a narcotic conspiracy. Special Agent Goldschein's name is affixed to that indictment (see additional record, Certified Appendix). Thus, there can be no doubt but that petitioner's fear of self-incrimination was genuine.

We can cite no authority to the effect that the government should not reach into a penitentiary for a then unoffending victim, subject him to an inquisition, manipulate empty forms of justice, tack additional years to his sentence, and throw him back to his cell.

We simply think it disgraceful. That is the totality of the "authority" we offer.

Petitioner here obviously cannot pretend to be an average, decent citizen. He is a convicted purveyor of drugs. But the procedures followed in the District Court, sanctified by the Court of Appeals, and now brought before your Honors for supervisory consideration will, if the Court of Appeals opinion be permitted to stand, represent a kind of nadir of criminal law enforcement.

No longer need the policeman drearily await an offense. He may simply select a man from the penitentiary (or elsewhere) who can be counted upon not to "cooperate" (as our policeman puts it). If law enforcement is to be reduced to a hatful of rags, a more effective means of accomplishing that result is hard to imagine.

Had the government made an adequate showing of necessity; had the proceedings been less in the nature of the shuffling of empty forms; had it been made to appear that petitioner was in a position substantially to assist

the Grand Jury inquiry, it is then conceivable that these proceedings might have been justified. Instead, petitioner was a lump of raw material, fed through Agent Goldschein's grist grinder, purveyed to the Judicial Machine, processed there to the tune of one and one half years, and returned to its dungeon cell for storage.

II.

The verbal order of court requiring petitioner's testimony was void, so that petitioner could not properly be held in contempt for refusing to comply with that order. The record is absolutely barren of evidence to the effect that the Trial Judge's written order, which may or may not have been a valid order, was brought to the notice of petitioner, so that petitioner could not be in contempt for failure to comply with that order.

On August 13, 1959 the District Judge, in petitioner's presence in open court, stated in the following language that he, the Judge, was conferring immunity from prosecution: ". . . this court now grants you immunity from prosecution . . ." (App. 18) and ". . . I now grant you immunity from such prosecution and direct you to answer the questions propounded to you by the Grand Jury" (App. 19).

The court's order was clearly void. The court lacked power himself to grant immunity from prosecution. *Isaacs v. United States*, 8 Cir., 256 F. 2d 654, 661 (1958) held that an attempt by a trial judge to grant immunity in exchange for testimony constituted an invasion of executive and legislative powers. See also *Ullmann v. United States*, 350 U. S. 422, 434 (1956). The court's authority was limited to making certain findings, *i.e.*, whether the statutory requirements were complied with by the Grand Jury, the

United States' Attorney, and the Attorney General. *Ullmann v. United States, supra*, 434; *Coroni v. United States*, 6 Cir., 250 F. 2d 578; 579 (1958).

The Court of Appeals for the Seventh Circuit, in reviewing this case seems to concede the invalidity of the verbal order:

> "Strictly speaking, the criticism may be well founded that the court itself could not grant immunity."

(See Opinion, Appendix A, this Petition)

The opinion of the Court of Appeals goes on to explain that the situation was really alright, because the trial judge had merely adopted his own way of expressing to petitioner the immunity granted by the statute. But the defect in the situation derives from the facts that: (a) the judge's verbal order was nonetheless void because the judge had no authority to grant immunity, and, (b) The written order which was entered (which we contend elsewhere was itself defective) was never shown to have been brought to petitioner's attention.

If the verbal order was void, petitioner could properly fail to comply with it. If petitioner did not have actual notice of the written order, assuming it to be valid, his failure to comply with it could not form a basis for contempt. Nothing in the record suggests that petitioner had an opportunity to examine it prior to his refusal to testify at his second Grand Jury appearance. For aught it appears, the written order was entered *ex parte*. The record raises doubts as to whether or not the written order was even available for examination prior to petitioner's second appearance before the Grand Jury. The written order does not have the stamp of the clerk of court thereon, from which it might be determined when the order was filed. If the order was simply signed on the date it bears,

was never shown or read to petitioner, and was not even available in the office of the clerk of court for inspection by petitioner or someone acting for him, the order would, in petitioner's eyes, simply not exist. Such is the state of the record that it not only fails to show beyond a reasonable doubt that petitioner had notice of the written order, but it appears affirmatively that petitioner could not have had notice of that order. Thus the only order of which petitioner had notice was the court's void verbal order.

But one cannot be punished for contempt of a court order unless he has actual notice of that order. Further, in the sort of case before this Court, the government has the burden of proving that the supposed contemnor had such actual knowledge. Thus in *United States* v. *Hall*, 2 Cir., 198 F. 2d 726, 729 (1952) the court observed that under 18 U. S. C., Section 401(3):

> "... there must be proof of the contemnor's knowledge of the order . . . and the burden on the government is a high one."

Nor is constructive notice of the order entered sufficient. There must be actual knowledge of the entry of the order, and the government must prove that knowledge by substantial evidence, *United States* v. *Thompson*, 2 Cir., 261 F. 2d 809, 810 (1958).

In *Green* v. *United States*, 356 U. S. 165 (1952), this Court acknowledged the existence of the rule requiring actual knowledge, holding (pp. 178-179) that the District Judge was there justified in finding that the evidence established, beyond a reasonable doubt, that the contemnors there knew of the order which formed the basis of the citation. One Justice, dissenting on a question of fact, stated

the rule which the majority assumed to be the correct rule, in the following language:

> "The indispensable element of that offense [violations of 18 U. S. C., Section 401 (3)] is that the petitioners, who were not served with the order, in some other way obtained actual knowledge of its existence and command." *Green v. United States*, 356 U.S. 165, 221 (1958)

In the matter before your Honors no showing of any kind was made that the petitioner was either served with or had actual knowledge of the order for whose violation he was sentenced. He only had knowledge of an order which was void and which he had every right not to obey.

III.

The court's written order requiring petitioner's testimony was defective.

The written order requiring petitioner to testify (App. 14-15) recited an application had been made to compel the testimony. The application averred as facts, to bring it within the ambit of the immunity statute, Section 1406, Title 18, United States Code, (1) that the grand jury was investigating certain federal narcotics law violations; (2) that petitioner's testimony was in the public interest; (3) that the United States' Attorney and Attorney General had made application for an order directing the witness to testify, under the provision of the immunity statute.

While the court lacked authority itself to grant immunity, it had authority to make findings which would energize the immunity statute. *Ullmann v. United States*, 350 U.S. 422, 434 (1956); *Corona v. United States*, 6 Cir., 250 F. 2d 578, 579 (1958).

Corona enumerated the *necessary* findings as the three listed above. But here, the written order did not make

those findings. The written order simply recited that an application had been made, which application, as recited in the order, contained the necessary elements. But the court did not make any findings that the matters set forth in the application were in fact true. The court only stated in its order that the application had in fact been made.

The District Judge did make a finding but the only thing that the judge found in his written order, was that appellant had properly asserted his constitutional privilege not to answer questions. Had the court wished to adopt the allegations of the application as part of its findings, it could have done so very easily, merely by asserting that it found that matters recited therein were true. This the court did not do. What the court did do was to find that petitioner would incriminate himself if he were to answer the questions which had been put to him—and then ordered him to answer.

The written order was further defective in that it purported to grant petitioner immunity only as to certain of the subject matter of his testimony. The statute, however, which supposedly immunizes so that a witness' security thus granted is co-extensive with his protection under the constitutional amendment, provides for immunity broader than that allowed by the District Judge. The statute provides for immunity as to any ". . . transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify . . ." (18 U. S. C., Section 1406).

Here, the court severely limited the scope of the immunity proposed under the statute by stating in its order that petitioner should produce evidence ". . . relative to the aforementioned inquiry of said Grand Jury . . ." and that he should not be excused from testifying ". . . on the

ground that the testimony or evidence required of him . . ." might tend to incriminate him (App. 15). Thus by its terms the order contained two elements: (1) that petitioner should testify relative to "the aforementioned inquiry", and, (2) that petitioner should not be excused on grounds of self-incrimination from testifying to those matters "required of him".

The matters "required of him" were, of course, the matters "relative to the aforementioned inquiry". Thus immunity was not to apply to all testimony adduced. Only to part of it. The part relative to the aforementioned inquiry. It was left for petitioner to determine which questions related to the "aforementioned inquiry" and which did not. If he answered questions which were not "relative" to the inquiry, they could not properly be "required of him," so that as to those, he was without the scope of the supposed immunity.

The "aforementioned inquiry," according to the court's order related to violations of Parts 1 and 2 of Subchapter A of Chapter 39, Internal Revenue Code of 1954, whose penalty is provided in 26 U. S. C., Section 7237, and for violations of Sections 174 and 184(a) of Title 21, U. S. Code. Hence, if petitioner's answers revealed violations of statutes other than those enumerated, his answers would not have been compelled by the court's order and as to such matters petitioner would have been outside the scope of the supposed immunity. Similarly, his refusal to answer questions relating to other violations could not, since he had not been ordered to answer such questions, constitute a contemptuous refusal to obey the written order of the court.

In point of fact, questions were put to petitioner which plainly lay outside the immunity. Thus, he was asked about a marijuana sale (App. 22). But Section 176(a) Title 21, U. S. Code, severely penalizing marijuana transactions, was not one of the matters as to which he was "required" to answer questions. It is neither enumerated in the immunity statute nor is its penalty provided in 26 U. S. C., Section 7237, nor did the District Judge suggest that as to such transaction petitioner should be granted immunity.

The court in *Corona* v. *United States*, 6 Cir., 250 F. 2d 578-579 (1958) attached some importance to the fact that appellants were there sufficiently advised as to *just what questions* they were to answer in order to comply with the court's order. Such was not the case here. In addition to the burden thrown upon petitioner to decide what was or was not within the scope of the Grand Jury inquiry (assuming he could occultly have known of the written order by some means undisclosed by the record) he was faced with a verbal order which advised him in completely general terms to answer the questions "propounded to you by the Grand Jury" (App. 19) without specifying the exact questions to be answered.

We urge that where a Constitutional right is to be displaced, the person otherwise entitled to exercise that right must be placed in the same position of security through the substitute that he would have enjoyed had he not been deprived of his privilege.

IV.

Petitioner was adjudged guilty of contempt of court without the court's having made any determination that he properly invoked his privilege as to certain questions asked of him.

The statute is specific so far as qualification for immunity is concerned. Section 1406, Title 18, U. S. Code states in pertinent part that no witness:

> " . . . shall be prosecuted on account of any transaction, matter, or thing concerning which he is compelled, *after having claimed his privilege against self-incrimination* to testify. . . ." (Emphasis supplied).

At his second Grand Jury appearance, appellant was asked to answer questions previously put to him, but was also asked to answer questions not previously put to him and as to which he had not asserted his privilege. The statute appears to require the invocation of the constitutional privilege as to each transaction, matter, or thing to which immunity is to be extended. For it plainly states that witnesses shall not be prosecuted on account of matters to which they are compelled to testify *after* having claimed the privilege as to such matters.

Under the statute, the court would have no power to make findings which would energize the immunity statute, as to matters concerning which a witness had not invoked his privilege not to incriminate himself. Thus, as to such matters, no immunity could attach. On being asked new questions, and upon invoking his privilege not to answer them, petitioner was not returned to the District Judge for a further attempted grant of immunity. Yet he was sentenced to contempt for refusal to answer those questions just as surely as he was for his refusal to answer questions put to him at his first Grand Jury appearance.

That the additional questions were in fact incriminating is evidenced by the fact that the very same Grand Jury before which petitioner had appeared, indicted petitioner for narcotic conspiracies said to be in operation from 1956 until a date subsequent to petitioner's appearance before the Grand Jury. One of his co-defendants, one Jeremiah Pullings, was a man about whom petitioner was asked for the first time at his second Grand Jury appearance (App. 26). Petitioner invoked his constitutional privilege to questions about Pullings at his first opportunity, namely, at his second Grand Jury appearance. We caused to be made a part of the record in the Court of Appeals the indictment in question. It is stapled to the back of each appendix (yellow cover) supplied to this Court and is certified to the Court as part of the record.

In the case before your Honors, the District Judge sought to grant petitioner immunity as to answers to certain questions, but afforded petitioner no opportunity to qualify for immunity as to other questions. Petitioner was asked a large number of questions in both Grand Jury appearances. A burden was thrown upon him to recall exactly which questions had previously been put, as to which he had invoked his privilege. Petitioner's failure to remember the first batch of questions over the intervening four days between testimonial sessions would have placed petitioner in a desperate situation, namely, that of making possibly self-incriminatory answers, not covered by a supposed grant of immunity.

In the same connection this Court should observe that neither petitioner nor the attorney who ultimately appeared for him were provided with a transcript of the testimony of his first Grand Jury appearance. The second Grand Jury appearance occurred on August 14, 1959 at 10:00 a.m. (App. 21). A hearing before the District Judge took place on that date at 2:00 p.m. (App. 28). In that hearing, the Judge referred to a previous order to im-

pound the Grand Jury transcript of August 10, and stated that the impounding order should be lifted for petitioner's counsel (App. 30).

Thus a feat of reasoning was thrust upon petitioner as to just what was required by the order of court, and a feat of memory was thrust upon him to recall accurately just what questions had been put to him in his first Grand Jury appearance. The intellectual demands would have taxed the average lawyer. Petitioner's capacity to deal with this complicated situation is revealed, perhaps, by his observation " . . . I ain't answering no questions" (App. 6).

CONCLUSION.

For the foregoing reasons, we respectfully urge that this petition for certiorari should be granted.

Respectfully submitted,

MELVIN B. LEWIS AND
FRANK W. OLIVER,
Attorneys for Petitioner

State of Illinois }
County of Cook } ss.

Frank W. Oliver, being first duly sworn on oath deposes and says that he is one of the attorneys for Petitioner herein; that he served the foregoing Petition for Certiorari by mailing three copies thereof to the Solicitor General of the United States and three copies thereof to the United States Attorney, Chicago, Illinois.

.....

Subscribed and sworn
to before me this
st day of June, 1960.

.....

Notary Public

APPENDIX A.

OPINION OF THE COURT BELOW

February 29, 1960

Before HASTINGS, *Chief Judge*, and DUFFY and CASTLE, *Circuit Judges*.

DUFFY, *Circuit Judge*. This is an appeal from an order of the District Court adjudging appellant guilty of contempt of court for failing to answer a number of questions propounded by a Federal Grand Jury.

On August 10, 1939, appellant appeared as a witness before a Federal Grand Jury sitting in Chicago, Illinois, pursuant to a writ of *habeas corpus ad testificandum* which was served on the warden of the Federal Penitentiary at Leavenworth, Kansas. Appellant answered his name and admitted he was imprisoned in the Leavenworth penitentiary under a sentence of six years for the possession and sale of heroin. When asked where he obtained the heroin which he was convicted of having possessed and sold, he declined to answer on the ground he might incriminate himself. Thereafter, he declined on the same ground to answer other questions such as whether he knew certain named persons, whether he had obtained heroin from such named persons, or sold heroin or marijuana to them.

On August 13, 1959, the Grand Jury requested a ruling by the Court on appellant's claim of privilege. Judge Campbell ruled that the privilege was well taken except as to those questions asked on August 10 relating to the source of the particular narcotic drugs upon which his

prior conviction rested. Immediately thereafter, the Court received the Government's petition for an order directing appellant to answer questions pursuant to 18 U.S.C. § 1406, the immunity provisions of the Narcotics Control Act of 1956.[1] The Court granted the application and stated to plaintiff: "It, therefore, is no longer necessary for you to invoke the protection of the Fifth Amendment to protect yourself from incrimination or subsequent prosecution, because pursuant to the provisions of the Narcotic Control Act, I now grant you immunity from such prosecution and direct you to answer the questions propounded to you by the Grand Jury."

The Court directed appellant's appearance before the Grand Jury be deferred until the following day so that he might consult counsel in the interim. The Court explained to appellant that his failure to abide by the order of the Court could result in his punishment for contempt.

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[1] Pertinent are the following provisions of Title 18 U.S.C. § 1406: "Immunity of Witnesses. Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of—

1) any provision of part I or part II of Subchapter A of Chapter 39 of the Internal Revenue Code of 1954 the penalty for which is provided in subsection (a) or (b) of section 7237 of such Code,

2) subsection (c), (h), or (i) of Section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U.S.C., sec. 174), or

3) the Act of July 11, 1941, as amended (21 U.S.C., sec. 184a),

is necessary to the public interest, he, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in the next sentence) against him in any court. * * *"

The record shows that appellant had consulted counsel shortly prior to his first appearance before the Grand Jury.

The following day, appellant again appeared before the Grand Jury. He was asked the identical questions asked him on the previous day as well as ten or fifteen additional ones. Appellant refused to answer any of the questions, relying upon his privilege against self-incrimination.

Appellant's counsel argues that in its verbal order, the District Court told Piemonte that it was granting immunity, but counsel argues the Court had no such power. Counsel contends the written order which followed made no mention of immunity, stating only the order was made in accordance with § 1406, Title 28, U.S.C. He also urges Piemonte was much confused, and that the meaning of the alleged conflicting orders was hopelessly blurred.

The record clearly demonstrates that Piemonte understood what questions he was ordered to answer. When, for a second time, he refused to answer, Judge Campbell issued an order to show cause why Piemonte should not be held in wilful and deliberate contempt. On direct examination by his own counsel, the following exchange took place:

> "Q. Now, will you tell his Honor, Judge Campbell, the basis for your refusal to answer questions propounded to you before the Federal Grand Jury on August 10th and August 14, 1959?
>
> "A. Well, I am doing time in the penitentiary. I fear for my life. I fear for the life of my wife, my two stepchildren, and my family. I can't do something like that. I want to live, too."

During the argument, appellant's counsel said: " . . . his real basis for his disobedience is his fear that is imbedded." The District Court interjected, "It may well

be his real reason, but that is not a legal reason for failure to obey my order." It would seem that the District Court was on solid ground in holding that fear of underworld retaliation is no reason to excuse the appellant from his obligation to testify under a complete grant of immunity.

Judge Campbell was very patient with the witness and time after time gave him opportunity to say that he would testify before the Grand Jury. However, Piemonte steadfastly refused.

There is no indication that there was any confusion in Piemonte's mind. He understood the alternative, and deliberately chose to defy the Court. He stated: "Your Honor, I am not trying to defy you or get smart, or anything like that. I just can't." All these exchanges here inbefore quoted took place in open court in the presence of appellant's attorney.

Strictly speaking, the criticism may be well-founded that the Court itself could not grant the immunity. However, the statute granted the immunity and the manner in which Judge Campbell expressed that immunity was not in any way confusing to Piemonte.

The judgment of the District Court holding and finding that Armando Piemonte was guilty of contempt of court must be and is hereby

AFFIRMED.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B.

STATUTES INVOLVED

18 U.S.C., § 401. Power of Court.

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. June 25, 1948, c. 645, 62 Stat. 701.

18 U.S.C., § 1406. Immunity of Witnesses.

Whenever in the judgment of a United States Attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of—

(1) any provision of part I or part II of subchapter A of chapter 39 of the Internal Revenue Code of 1954 the penalty for which is provided in subsection (a) or (b) of section 7237 of such Code,

(2) subsection (c), (h), or (i) of section 2 of the Narcotics Drugs Import and Export Act, as amended (21 U.S.C., sec. 174), or

(3) the Act of July 11, 1941, as amended (21 U.S.C., sec 184*a*),

is necessary to the public interest, he, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section. Added July 18, 1956, c. 629, Title II, § 201, 70 Stat. 574.